

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
NORTHERN DIVISION**

AMERIGAS PROPANE, L.P. and
FERRELLGAS L.P.,

Plaintiffs,

V.

BP AMERICA, INC., BP CORPORATION
NORTH AMERICA INC., BP INTERNATIONAL
SERVICES COMPANY, BP PRODUCTS
NORTH AMERICA INC., BP ENERGY,
and BP AMERICA PRODUCTION COMPANY,

Defendants.

Case No.: 1:08-cv-00981

The Honorable James B. Zagel

THE BP DEFENDANTS' RULE 12(b)(6) MOTION TO DISMISS

Defendants BP America, Inc., BP Corporation North America, Inc., BP International Services Company, BP Products North America, Inc., BP Energy, and BP America Production Company (collectively the “BP Defendants”), by and through their counsel, move this Court under Federal Rule of Civil Procedure 12(b)(6) to dismiss Counts I, II, and III of AmeriGas Propane, L.P. and Ferrellgas L.P.’s Amended Complaint with prejudice. In support of this motion, the BP Defendants state as follows:

1. The Plaintiffs filed their Amended Complaint (the “Complaint”) on April 21, 2008 alleging monopolization and attempted monopolization claims against the BP Defendants under the Sherman Act, a Commodity Exchange Act claim, and a common-law unjust enrichment claim.

2. The Plaintiffs fail to properly allege a monopolization claim under the Sherman Act (Count I) as they cannot show that any of the BP Defendants (most notably BPPNA, the

defendant whose conduct is at issue) gained monopoly power. *See United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). As the allegations of the Complaint show, BPPNA's alleged conduct did not cause any structural change to the relevant market, did not last for a sufficient duration, and did not prevent the entry of others into the market.

3. The Plaintiffs fail to properly allege an attempted monopolization claim under the Sherman Act (Count II) because the allegations of the Complaint are not sufficient to show BPPNA had a dangerous probability of achieving monopoly power through its alleged actions. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993).

4. In addition, the Plaintiffs cannot bring claims under the Sherman Act as the Commodity Exchange Act is the statute governing the alleged conduct at issue, and thus, is the controlling remedy available to the direct purchaser Plaintiffs. *Schaefer v. First Nat'l Bank of Lincolnwood*, 326 F. Supp. 1186, 1191 (N.D. Ill. 1970), *aff'd*, 509 F.2d 1287 (7th Cir. 1975).

5. The Plaintiffs fail to properly allege an unjust enrichment claim (Count III) because they have an adequate remedy at law under the Commodity Exchange Act.

WHEREFORE, the BP Defendants respectfully requests that this Court dismiss the Plaintiffs' monopoly, attempted monopoly, and unjust enrichment claims — Counts I, II, and III of the Amended Complaint.

DATED: May 30, 2008

COUNSEL FOR THE BP DEFENDANTS

/s/ Kathryn F. Taylor

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **THE BP DEFENDANTS' RULE 12(B)(6) MOTION TO DISMISS** was filed electronically pursuant to the CM/ECF procedures on May 30, 2008 and will, therefore, be served electronically upon the parties in the action, and served via U.S. mail, first class, postage prepaid, upon.:

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and that copies were served this same date by U.S. mail only upon the following:

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